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No. 638

In the Supreme Court of the United States

OCTOBER TERM, 1937

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

MARCH 1938.

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OPINIONS BELOW

The specially-constituted District Court announced its decision from the bench at the conclusion of the argument (R. 613), and made findings of fact and conclusions of law (R. 161–168), without rendering a written opinion.

The reports of the Commission in *Coke from Alabama and Tennessee to Central Territory*

(R. 15–32; 33–38, 158–160), are published in 208 I. C. C. 281, 215 I. C. C. 384, and 219 I. C. C. 425.

An earlier report, dated June 30, 1933, in a related proceeding, entitled *Coke between Points in Central and Illinois Territories,* (R. 42–107), is reported in 194 I. C. C. 640.

JURISDICTION

The decree of the District Court was entered January 21, 1937. (R. 185–186) Petition for appeal was filed and allowed March 17, 1937. (R. 187, 193)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C., sec. 47), as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C., sec. 345).

QUESTIONS PRESENTED

The principal question involved is the validity of the Commission's order of April 30, 1936 (R. 39), prescribing a scale of distance rates for application from Birmingham, Ala., Chattanooga, Tenn., and Wise County, Va., to destinations in Illinois, Indiana, Ohio, and the lower peninsula of Michigan.

The particular questions presented are:

I. Whether the order was made without notice and hearing.

II. Whether the order is supported by substantial evidence.

III. Whether the order is contrary to the manifest weight and the indisputable character of the evidence.

IV. Whether the order attempts "to equalize geographical and transportation disadvantages, fortune, opportunities or abilities."

V. Whether the Commission "proceeded under erroneous constructions of law and misapprehensions in respect of its powers, in testing the interterritorial rates from the South by the level of rates applicable within central territory, instead of employing ordinary and well-recognized standards of rate determination."

VI. Whether the order is supported by necessary findings.

STATUTES

Pertinent provisions of the Interstate Commerce Act are printed in the Appendix, *infra,* pages 81–89.

STATEMENT

Proceedings before the Commission

The proceeding *Coke from Alabama and Tennessee to Central Territory, supra,* I. & S. 3985, was a continuation of the controversy between northern railroads and northern coke shippers, on the one hand, and railroads and coke shippers in the South, on the other hand, regarding the rate structure on coke within central territory and interterritorially from the South to central territory, which was considered by Division 4 of the Commission (Commissioners Meyer, Eastman and Ma-

haffie) in *Coke between Points in Central and Illinois Territories*, 194 I. C. C. 640, decided June 30, 1933.[1]

That proceeding was begun by a formal complaint filed under section 13 (1)[2] by the Alabama By-Products Corporation et al. against the Louisville & Nashville R. R. Co. et al., Docket No. 22052, alleging that the rates on coke[3] from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan were unreasonable, in violation of section 1 (5), and unduly prejudicial as compared with the rates accorded their competitors located at Chattanooga, Tenn., and at various origins in central territory, in violation of section 3 (1). (R. 45) Shortly thereafter six other formal complaints were filed which put in issue

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[1] Central territory is roughly described as lying north of the Ohio River, west of a line drawn through Buffalo, N. Y., Pittsburgh, Pa., and Wheeling, W. Va., and east of the Mississippi River from Cairo, Ill., to approximately Burlington, Iowa. It does not embrace that part of Illinois lying north of a line extending northeasterly from Burlington to Chicago. See maps, 31 I. C. C. 350, 45 I. C. C. 302, and *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 351–352.

Illinois Freight Association Territory embraces the entire State of Illinois, points on the west bank of the Mississippi River opposite that State, and points in southern Wisconsin south of a line from Milwaukee through Watertown to Madison and thence through Dodgeville to the Mississippi River north of Dubuque, Iowa. (140 I. C. C. 227, 229.)

[2] Unless otherwise indicated, all sections referred to herein are provisions of the Interstate Commerce Act, part I.

[3] All rates referred to herein are carload rates.

inter alia the reasonableness under section 1 (5) of coke rates within central and Illinois territories and the relation, under section 3 (1), between the coke rates in central territory, on the one hand, and rates from Birmingham and Chattanooga to destinations in central territory, on the other hand. Northern shippers alleged that they were subjected to undue prejudice by the relation between their rates to given destinations in central territory and the rates from the South to the same destinations, to the undue preference of the southern shippers, and, conversely, southern shippers alleged that this rate relation unduly preferred northern shippers and unduly prejudiced the southern shippers. About the same time the carriers proposed revised rates on coke in central and Illinois territories; these rates were suspended by the Commission, under section 15 (7), and an investigation instituted as to their lawfulness, I. & S. Docket No. 3511.

All these proceedings were consolidated and were decided by Division 4 of the Commission in the above-mentioned report, in which Division 4 prescribed a scale of distance rates on coke as maximum reasonable rates for application within central territory. This scale, set forth in Column 2 of Appendix 8 of the report therein (R. 107), is designated as the *Column 2* scale. This scale begins with a rate of 90 cents per ton for distances of 10 miles and under and progresses gradually to $4.75 per ton for distances of 800 miles and over 770. In

the same proceeding Division 4 also prescribed a scale of distance rates as maximum reasonable rates for application from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to points in central territory. This scale, designated as the *Column 3* scale, was approximately 10% higher than the Column 2 scale.[4]

Division 4 found that none of the rates in issue caused undue prejudice and expressed the view that if any undue prejudice existed it would be corrected by the establishment of the scales prescribed. (R. 85)

The order of June 30, 1933, in that proceeding (R. 108, 125–126) required that rates not in excess of the Column 2 and Column 3 scales be established and made effective on or before September 15, 1933. By subsequent orders this effective date was extended to March 15, 1934. (R. 163)

At the time of the issuance of this order many of the existing rates in central territory were higher than the prescribed Column 2 scale and many were lower. Although the order of Division 4 did not require any increases—merely prescribing the scales as maxima—the central territory carriers decided to revise all their rates in central territory so as to put them exactly on the scale, and accordingly they reduced all rates in excess of the scale and increased

[4] No coke is now manufactured at Alabama City or Holt. Woodward and Dolcito Junction are in the Birmingham district, take Birmingham rates, and are hereinafter collectively called Birmingham. (R. 16)

all that were below the scale, and made the revised rates effective March 15, 1934. (R. 17–18, 163)[5]

Many of the interterritorial rates from the South to central territory were higher than the Column 3 rates and many were lower. (R. 18, 163) These interterritoral rates, applicable jointly over the lines of southern and central territory carriers, were published by the southern carries under concurrences previously given to them by the central territory carriers. (R. 163)

After the issuance of the order of June 30, 1933, the southern carriers established and made effective March 15, 1934, reductions in all interritorial rates from Birmingham to destinations in central territory that were higher than the Column 3 scale, but did not increase any of the then-existing rates that were lower than the Column 3 rates. (R. 163) They were of the view that the Column 3 rates were too high, and since the order did not require any increases (it was not a minimum rate order) but merely prescribed Column 3 as *maxima,* they left in

[5] There were some exceptions. Intrastate in Ohio the scale prescribed by the State Commission applies. That scale is slightly lower up to 40 miles and the same beyond that distance as the Column 2 rates. The Illinois carriers did not publish the Column 2 rates on the ground that their rates then in effect did not differ sufficiently from the Column 2 rates to warrant the expense of publishing new tariffs. They intend to establish the Column 2 rates the first time new tariffs are published. About 57 short-haul rates, mostly for distances under 30 miles, lower than Column 2 rates, have been established in central territory to meet truck competition. (R. 17)

effect without change all rates that were lower than Column 3. (R. 34, 163)

The reductions in the rates from Birmingham required reductions in some of the rates from Chattanooga, an intermediate point, in order to avoid violations of the long-and-short-haul clause of section 4. Accordingly, wherever the Column 3 rate from Birmingham was lower than the rate from Chattanooga to a given destination in central territory, the rate from Chattanooga was reduced to the same level as that from Birmingham. These revised rates from Chattanooga, like those from Birmingham and within central territory, became effective March 15, 1934. (R. 18, 163)

Coke rates from Wise County, Va., were not involved in I. & S. 3511. The order in that proceeding required no changes in those rates, and none was made. (R. 18)

Pressure was brought to bear on the carriers in central territory by producers therein to increase all rates from southern origins to central territory to the Column 3 basis. The southern carriers were opposed to such increases and refused to make them. In order to compel them to do so, certain of the central carriers restricted their concurrences to rates that were no lower than the Column 3 rates. (R. 18, 35)

Under the compulsion of the restricted concurrences, the southern carriers published and filed with the Commission tariff schedules, proposed to

become effective May 1 and August 3, 1934, on 30 days' notice, naming new rates on coke on basis of the full maximum Column 3 scale from Birmingham, from Chattanooga, and from points in Wise County, Va., to destinations on the lines of such of the central territory carriers as had restricted their concurrences. From Birmingham and from points in Wise County, Va., the rates so published were increases, while those from Chattanooga were increases in some instances and reductions in others. (R. 16, 163)

Prior to said effective dates the southern carriers themselves and also the southern coke shippers filed protests with the Commission against the proposed schedules and requested their suspension. (R. 16, 163)

By orders dated April 30 and July 30, 1934, under section 15 (7), the Commission suspended the proposed schedules and entered upon an investigation respecting them, I. & S. Docket No. 3985. (R. 163–164) These orders of investigation put in issue the question whether the rates named in the suspended schedules would be lawful rates under the Interstate Commerce Act, and, in particular, whether they would be reasonable under section 1 (5), and free from undue prejudice and preference under section 3 (1).

A hearing was held in this proceeding (R. 202–414), briefs were filed and the case orally argued before the Commission. (R. 416–509)

On March 11, 1935, the Commission (all eleven Commissioners participating) issued a report, *Coke from Alabama and Tennessee to Central Territory,* 208 I. C. C. 281 (R. 15–32), in which it found, among other things, that rates from southern to central territory made by applying the aforesaid Column 2 scale from origins to destinations and adding thereto certain arbitraries *for hauls in southern territory,* were and for the future would be maximum reasonable rates. It further found that the suspended schedules had not been justified, and by order of March 11, 1935 (R. 32–33), required the respondents to cancel them. (R. 28, 164)

On March 20 and 28, 1936, the southern coke shippers filed petitions with the Commission requesting reconsideration of its decision and order of March 11, 1935. Replies to these petitions were filed by the central territory carriers and coke shippers on April 7, 1936. Appellants, as respondents in said proceeding before the Commission, in their replies to said petition for reconsideration, made no suggestion that the evidence introduced at the aforesaid hearing did not fully disclose all the relevant facts and circumstances and made no request for leave to submit further evidence. By order of April 15, 1936, the Commission reopened said proceeding for reconsideration on the record as it then stood. (R. 164)

On April 30, 1936, the Commission issued its report on reconsideration, 215 I. C. C. 384 (R. 33–38), seven commissioners concurring and four dissenting, in which it affirmed the finding that the suspended schedules had not been justified, and further found that rates on coke from Birmingham, Chattanooga, and Wise County, Va., to the destinations in question for the future would be unreasonable to the extent they exceeded the column 2 scale. The report and order of April 30, 1936, vacated and set aside previous orders to the extent that they required the establishment and maintenance of higher coke rates from and to the same points. (R. 164–164)

Commission's findings

The Commission's ultimate conclusion was that the coke rates in issue "for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix * * *." (R. 37)

The rates set forth in that scale (R. 38) were the same for the same distances as the rates then in effect in central territory, which had been prescribed as maximum reasonable rates in *Coke between Points in Central and Illinois Territories,* 194 I. C. C. 640, and made effective March 15, 1934. These were the Column 2 rates; and in this connection the Commission found that "the Column 2 rates are now applicable between points in central

territory with a few exceptions mentioned in the original report." (R. 35)

In other words, the Commission found that the interterrritorial rates in issue, all of which were on the Column 3 basis, were 10% higher than the general level of coke rates prevailing throughout the destination territory.

The Commission further found that the interterritorial rates in issue were also higher than the general level of voluntarily maintained coke rates within the South. Its finding in this regard reads:

> The rates from Chattanooga, Birmingham, and Wise County, Va., to southern destinations are in certain instances slightly higher, and in others lower, than they would be if made strictly on the Column 2 basis, but they average about the same. From Chattanooga and Birmingham combined to all destinations having a population of 5,000 or more, both the present and the Column 2 rates average $2.96 per ton. (R. 35)

It thus clearly appears from the Commission's findings that the interterritorial rates in question exceeded the voluntarily-established coke rates in the South and exceeded the prescribed coke rates in the North.

The Commission found that "the southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the Column 2 rates would further re-

strict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect." (R. 35)

It was found that coke is shipped only from the Birmingham district, Chattanooga, and stations on the Louisville & Nashville and Interstate railroads in Wise County, Va., to central territory and that the traffic moves over the *main lines* of carriers reaching the Ohio River, and that all traffic from the South to central territory and the Northwest moves over those lines. The traffic density on one of the southern lines participating in the interterritorial transportation of coke, viz., the Cincinnati, New Orleans & Texas Pacific, whose line extends from Chattanooga to Cincinnati, as indicated by the revenue net tons per mile of road, "exceeded that handled by such carriers as the Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, New York Central Railroad Company, and the Wabash Railroad Company, and the average handled by all lines operating in central territory, even when those which extend into western trunk line, southwestern, and southern territories are excepted." (R. 35–36)

Too much weight was given in the prior report, the Commission found, to the absence of certain specific data, that is, as to the traffic density over routes from Birmingham, *and not enough to the*

established rate adjustments in southern and central territories, and the effect rates have on the interterritorial movement of the traffic.

The Commission found that "Coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory." In this connection it said: "We have frequently recognized that the transportation burden is differently distributed in official and southern territories and that, on some commodities, rates may justly be relatively lower in the South than in official territory. We have also, in several cases where competitive conditions are somewhat analogous to those here indicated, prescribed rates from origins in western trunk line and southern territories to official territory on the basis of the scales that apply in official territory. *American Distilling Co.* v. *Akron, C. & Y. Ry. Co.*, 140 I. C. C. 633; *Newsprint Paper Investigation*, 197 I. C. C. 738." (R. 36)

The Commission found that the producers of coke in official territory (of which central territory is a part) "have no just ground for complaint against interterritorial rates from the South to central territory on the same level, mile-for-mile, as those they pay", that "if interterritorial rates higher than Column 2 rates were warranted, as the central carriers contend, because of more difficult operating conditions in the South it would be proper that the increment accrue solely to the southern carriers",

and that "the carriers in central territory are entitled only to maximum reasonable compensation for the services they perform, which will be afforded them by the prescription of the Column 2 rates." (R. 36)

The Commission affirmed the conclusion it had reached in its prior report "that the contention of the coke producers and carriers in central territory that the establishment of rates from the South on the Column 2 basis would be unduly preferential, was without merit." (R. 35) And it further found:

> Rates on coke from the South to points in central territory, on the basis of the scale hereinafter prescribed, will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers. (R. 36–37)

All of the above findings and conclusions were made in the report on reconsideration. There were, in addition, important findings of fact in the earlier report which were not withdrawn. Reference will be made to some of these later in this brief.

Changes in rates involved subsequent to making up of record herein

The rates prescribed in the order of April 30, 1936, were established and made effective August 13, 1936 (R. 162), and remained in force until November 15, 1937.

These and other coke rates generally were increased effective November 15, 1937, pursuant to the authorization in *General Commodity Rate Increases, 1937, Ex Parte No. 115,* 223 I. C. C. 657, decided October 19, 1937, in which the Commission authorized permanent increases of 3 cents per ton in all rates on coke of 75 cents per ton or less, 5 cents per ton in rates ranging from 76 cents to $1.00 per ton, and 10 cents per ton in all rates over $1.00 per ton. See pages 673, 685–688, 740, 741, 749, 762–763 of the above report.

This authorization embraced all coke rates throughout the country, including the three sets of coke rates involved in this case, namely, those in central territory, those in southern territory, and the interterritorial rates between southern and central territories.

We do not suggest that this change in the rates involved renders the case moot, as in the *Lake Cargo Case, United States* v. *Anchor Coal Co.,* 279 U. S. 812, and cases cited. The situation would seem to be similar to that of the amended regulations considered in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 413–414, as to which this Court said:

> Regulations IV, V and VII, issued by the Secretary of the Interior prior to these suits, have since been amended. But the amended regulations continue substantially the earlier requirements, and expand them. They present the same constitutional questions, and

the cases as to these are not moot. *Southern Pacific Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 514–516; *McGrain* v. *Daugherty*, 273 U. S. 135, 181, 182.

Assuming the case at bar is not moot, we suggest that the question now is, not the validity of the order of April 30, 1936, but the validity of that order as modified by the Commission's order of October 19, 1937, which reads as follows:

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of October, A. D. 1937.

General Commodity Rate Increases, 1937

Ex Parte No. 115

In the Matter of Increases in Freight Rates and Charges

It appearing, That by its report this day entered in the above-entitled proceeding, 223 I. C. C. 657, which is hereby referred to and made a part hereof, the Commission authorized certain increased rates of carriers subject to the Interstate Commerce Act;

It is ordered, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates which have

or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the increased rates herein authorized to be applied; but that in all other respects said orders shall remain in full force and effect unaffected by this order.

It is further ordered, That all tariffs or supplements changing rates under the authority of the above-entitled proceeding, which are now maintained or held by virtue of outstanding orders of this Commission shall bear on their title page specific reference to this order.

And it is further ordered, That a copy of this order be served on each carrier party to the orders referred to in the next-preceding ordering paragraph, and that a copy thereof be inserted in the docket in each such proceeding.

By the Commission:

[SEAL] W. P. BARTEL, *Secretary.*

This order is not in the record here. We have, however, deposited a certified copy of it with the Clerk.

Proceedings in Court below

Appellants, 19 central territory carriers, by petition filed July 22, 1936, sought to enjoin the Commission's order of April 30, 1936, in I. & S. 3985 naming the United States and the Commission as defendants. They filed answers. (R. 129, 131)

Certain central territory coke shippers, viz., the Interlake Iron Corporation, the Laclede Gas Light Company, The Milwaukee Coke and Gas Company, The North Shore Coke & Chemical Company, Citizens Gas & Coke Utility and the Indiana Gas & Chemical Corporation, operating by-product coke plants at Chicago, Ill., Toledo, O., Erie, Pa., Carondelet (St. Louis), Mo., Milwaukee, Wis., Waukegan, Ill., and Indianapolis and Terre Haute, Ind., intervened as plaintiffs in opposition to the Commission's order. (R. 146, 155)

These northern interveners have not joined in this appeal.

The southern railroads over whose lines the coke traffic from southern origins to central territory is transported, namely, the Cincinnati, New Orleans & Texas Pacific Railway Company, Southern Railway Company, Illinois Central Railroad Company, Nashville, Chattanooga & St. Louis Railway and Louisville & Nashville Railroad Company, intervened as defendants in support of the Commission's order. (R. 141)

The Alabama Iron & Steel Shippers Conference, whose members manufacture by-product coke in the Birmingham district, also intervened as defendants in support of the order. (R. 144)

After a hearing (R. 555–613) the Court below, specially constituted of three judges as required by the statute, made findings of fact, in 23 para-

graphs (R. 161–167), and conclusions of law in 9 paragraphs (R. 167–168), which are here quoted:

> 1. That the evidence supports the findings of the Commission, and in making its orders the Commission did not exceed its authority, and said findings support its conclusions and its order of April 30, 1936, prescribing maximum reasonable rates for the transportation in question.
>
> 2. The Commission's conclusion that the rates prescribed in the order of April 30, 1936 for future application will be maximum reasonable rates, is supported by evidence.
>
> 3. The Commission's conclusion that the rates on coke from the South to points in central territory as prescribed in said order will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers, is supported by the evidence.
>
> 4. The Commission properly gave consideration to the effect of rates upon the movement of traffic.
>
> 5. The Commission's conclusion that the suspended rates in issue in Investigation and Suspension Docket No. 3985, proposed for interterritorial application from the South to central territory would be unreasonable to the extent that they exceeded those prescribed by said order of April 30, 1936, is supported by the evidence showing that said proposed rates were higher, distance considered, than the rates applying in either

territory through which said interterritorial traffic passed.

6. Said order of April 30, 1936, is valid.

7. This Court is not required to pass upon the validity of the Commission's order of March 11, 1935.[6]

8. The order of April 30, 1936, in Investigation and Suspension Docket No. 4198 was within the Commission's power under paragraphs (2) and (7) of Section 15 of the Interstate Commerce Act.[7]

9. The bill of complaint should be dismissed for want of equity at plaintiffs' costs.

Final decree dismissing the bill was entered January 21, 1937. (R. 185–186) This direct appeal followed.

SUMMARY OF ARGUMENT

I. The Commission accorded appellants a full hearing. Hearings were held in both I. & S. 3511 and I. & S. 3985, at which appellants were present and were accorded full opportunity, of which they availed themselves, to present evidence and to examine and cross-examine witnesses. The bill of complaint admits these hearings were held and its only allegation as to lack of hearing is that the order of April 30, 1936, in I. & S. 3985 was made

[6] This order was vacated and set aside by the Commission's subsequent order of April 30, 1936. (R. 40)

[7] This order was complied with, by suspension of the schedules referred to therein, and the proceeding was discontinued. (R. 559) Any question as to the validity of this order is moot.[6] No further reference is made to it herein.

on petitions for reopening and reconsideration on the present record, without a further hearing. Appellants' reply to the petitions for reopening and reconsideration contained no suggestion that the full facts were not before the Commission and made no request for opportunity to submit further evidence. In the absence of such a suggestion or request, the reopening of the proceeding for reconsideration on the record as it then stood did not deprive appellants of their right to a hearing.

The allegation of the lack of a hearing was limited by the bill, the answers, and the findings of the court below to the issue whether the order upon reconsideration of the record as it then stood, and without *further* hearing, deprived appellants of a full hearing. By their brief filed in this Court appellants now allege that the order deprives them of their right to a hearing on the ground that it requires reductions from southern points to all destinations in central territory, whereas there were in issue only the suspended rates which applied to a limited number of points in central territory. This contention is based upon an erroneous interpretation of the order. When the order is read with the report, of which it is a part, it clearly appears that it prescribes rates only to the destinations in issue, i. e., in Illinois, Indiana, Ohio, and the lower peninsula of Michigan to which the suspended rates applied. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 626–627; *Georgia Commission* v. *United States,* 283 U. S. 765, 772.

Aside from the merits of this contention, it should be rejected because of appellants' failure to make appropriate complaint either to the Commission or to the court below. Although they had the right to apply to the Commission for a further hearing or modification of the order they filed no such application. They made no appropriate allegation on this subject in their bill of complaint and no more than passing mention of it in the court below. *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 82 L. Ed. 205, 210–211, and cases cited.

II. The order is supported by evidence establishing the essential transportation facts, such as points of origin and destination, routes of movement, distances, volume of the traffic, character and value of the commodity, transportation conditions, etc. In addition the evidence contains voluminous comparisons of the rates in issue with other rates, especially rates on coke, establishing that the interterritorial coke rates in issue were higher than the rates prevailing on coke in the two territories through which the interterritorial traffic passes. It shows that the central territory rates were on the Column 2 basis and also that the southern territory coke rates averaged the same as Column 2, whereas the interterritorial rates in issue were 10% higher than Column 2. The coke rates in central territory had been prescribed by the Commission, Division 4; those in the South were voluntarily established and maintained by the carriers. Such comparisons may

be accepted as evidence of probative value in proving the unreasonableness of rates. *Louis. & Nash. R. R.* v. *United States,* 238 U. S. 1, 11, 15; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 565; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665–666. The evidence also shows that rates lower than the Column 3 basis were in effect interterritorially from the South to many other points in central territory, i. e., to points on the lines of many carriers with lines in Illinois and Indiana that did not restrict their concurrences. The evidence further showed that the revenue under the Column 2 rates as applied to the traffic from Birmingham and Chattanooga combined would aggregate approximately the same as the revenues under the prior rates. There was much other evidence but this, without more, is sufficient to show that it was substantial, and thus meets the rule of this Court. *Int. Com. Comm.* v. *Union Pacific R. R.,* 222 U. S. 541, 548.

III. The order is not contrary to the "manifest weight" and "indisputable character" of the evidence. Preliminarily appellants' statement that the order requires "drastic" reductions "in all coke rates from southern points to central territory destinations" should be corrected. No reduction was more than 10%, and the rate changes resulting from the order were not all reductions but in many instances were *increases,* especially from Chattanooga and Wise County, Va. For example, to Detroit, Chattanooga's most important northern mar-

ket, the rate was increased 50 cents a ton, from $3.65 to $4.15 per ton. The fact that the Commission reached a different conclusion from that of Division 4 on a separate record obviously does not show that the Commission's order is contrary to the weight of the evidence. Appellants' argument in this connection contains a significant admission. It admits that appellants "contend for" the Column 3 scale for interterritorial application. While attacking the Commission's orders in I. & S. 3985, prescribing the Column 2 scale, appellants make no complaint against the previous order of Division 4 prescribing the Column 3 scale. They do not allege that the Column 2 scale is confiscatory. Thus appellants, in substance, ask the Court to perform an administrative function, i. e., to determine which of the two scales should apply to this interterritorial traffic. The evidence was conflicting; its weight was not "manifest" and its character not "indisputable". In cases of this kind the courts will not weigh the evidence or attempt to settle conflict in the testimony. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 100; *Ill. Cent. R. R.* v. *Int. Com. Comm.*, 206 U. S. 441, 446; *Louis. & Nash. R. R. Co.* v. *United States*, 245 U. S. 463, 466; *Warehouse Co.* v. *United States*, 283 U. S. 501, 508. The fact that the Commission did not here prescribe the same coke-rate adjustment as it had prescribed in earlier cases is not of legal significance. These earlier scales were considered and rejected. Alleged

admissions of witnesses in expressing their views as to the reasonableness of the rates in issue could not fetter the Commission's judgment on the question. The position of the southern carriers was that the Column 2 scale would be a "reasonable basis or a fair and just basis" to be applied to the interterritorial traffic. The southern shippers urged the Commission to exercise its powers to put them on a rate equality with their northern competitors, maintaining the Commission had power to do this under sections 1 (5), 3 (1), and 15 (1), stressing more particularly 3 (1), requiring nonprejudicial rates. The Commission's order was based exclusively on section 1. But to plead the law relied on is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29, 36–37. Under the evidence the Commission was authorized to predicate its order upon section 1, aside from the position of the parties. The Act requires "just and reasonable" rates. There is no requirement for allegation or proof of unreasonableness *per se.* The Commission did not err in considering along with all the other evidence the fact that "the southern producers of coke are able to sell in central territory only to a limited extent on the present rates" and that "the southern carriers are convinced that any rates higher than the Column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues." *Ann Arbor R. Co.* v. *United States,* 281

U. S. 658, 666–667; *Interstate Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 553–555, section 15a (2).

IV. The Commission's order, in prescribing interterritorial rates equal mile-for-mile to those prevailing throughout central territory, required equality of rates under similar conditions, and is not void on the ground that it merely equalized geographical and transportation disadvantages. It is a valid exercise of the Commission's power to prescribe reasonable rates. While general transportation conditions in southern territory are not as favorable as in central territory, and, considered as a whole, southern is a higher-rated territory than central, this is not true as to coke, since the Commission found that coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory. Coke transported from the South to central territory moves every mile of the way through territory in which the prevailing coke rates are approximately the same as the Column 2 scale. To find a higher scale unreasonable and to prescribe the Column 2 scale for application between two territories in which the rates on coke are approximately the same as the Column 2 scale seems obviously not to equalize geographical and transportation disadvantages but only to require an equal rate under similar conditions and thereby remove an artificial, unjustified *rate* disadvantage.

V. In testing the reasonableness of the interterritorial rates from the South the Commission did

not proceed under erroneous conclusions of law or misapprehension in respect of its powers. Appellants' argument in this regard is predicated upon the assertion that the sole ground for the reductions required was the level of prevailing coke rates within central territory. This was not the sole ground. It was an important fact to which the Commission did ascribe great weight, but there was also the important fact that the interterritorial rates were likewise higher than the average of coke rates generally prevailing throughout the South. In a number of previous cases the Commission has prescribed interterritorial rates from the South to official territory on the basis of the scales that apply in official territory. Appellants are entitled to just, reasonable and equitable divisions of the interterritorial rates here prescribed by the Commission. It may not be anticipated in the event the Commission prescribes divisions of these rates that it will require other than just, reasonable, and equitable divisions.

(a) The effect of the rates upon the movement of the traffic was properly given consideration in determining the question of reasonableness. By section 15a (2) the Commission is required, in the exercise of its power to prescribe just and reasonable rates, to give due consideration, among other factors, "to the effect of rates on the movement of traffic." This it must do in a case involving particular rates as well as in general revenue cases.

VI. The findings are adequate. *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464–465; *Ohio* v. *United States*, 292 U. S. 498, 511; *Florida* v. *United States*, 292 U. S. 1, 9; *United States* v. *Louisiana*, 290 U. S. 70, 80. No complaint was made to the Commission regarding the findings. The point should be overruled on this ground.

ARGUMENT

I

The Commission accorded appellants a full hearing

It is admitted in the bill of complaint that the Commission held a hearing in *Coke between Points in Central and Illinois Territories*, I. & S. Docket 3511, involving *inter alia* the reasonableness of coke rates from Birmingham (Dolcito Junction Woodward, etc.) to destinations in central territory. (R. 5) It is further admitted in the bill that after the institution of the investigation in I. & S. Docket 3985, involving the lawfulness of coke rates from Birmingham, Chattanooga, and Wise County, Va., to central territory, another hearing was held. The record shows this hearing took place at Louisville, Ky., September 11–14, 1934 (R. 202), and that counsel for appellants were present and actively participated in the examination and cross-examination of witnesses.

It was nevertheless alleged in the bill that the order of April 30, 1936, in I. & S. 3985 "was made

without hearing, but on the petitions of several parties hereinbefore set out for reopening and reconsideration on the present record." (Par. VI of bill, R. 10)

The facts in this regard were fully shown in the Commission's answer (pars. V and VI, R. 136, 137), and were found by the court below, in findings Nos. 11 and 13, which read as follows (R. 164):

> 11. Hearing in said proceeding was held in Louisville, Ky., on September 11, 12, 13, and 14, 1934, at which voluminous evidence was introduced, consisting of oral testimony of witnesses, and numerous documentary exhibits, on behalf of respondents, including plaintiffs herein, and other parties to said proceeding, including intervening plaintiffs and intervening defendants herein.
>
> 13. On March 20 and 28, 1936, the southern coke shippers filed petitions with the Commission requesting reconsideration of its decision and order of March 11, 1935. Replies to these petitions were filed by the central territory carriers and coke shippers on April 7, 1936. Plaintiffs herein, as respondents in said proceeding before the Commission, in their replies to said petition for reconsideration, made no suggestion that the evidence introduced at the aforesaid hearing did not fully disclose all the relevant facts and circumstances and made no request that they be granted leave to submit further evidence. By order of April 15, 1936, the Commission reopened said proceeding for reconsideration on the record as it then stood.

Thus the allegation that the order of April 30, 1936, was made without a hearing was limited by the bill of complaint, by the answers, and by the findings of the court below to the issue as to whether the order, made after reopening and reconsideration on the record as it then stood, and without *further* hearing, deprived appellants of a full hearing. The issue was decided below adversely to appellants.

Appellants now contend, brief, pages 19 et seq., notwithstanding the absence of an appropriate allegation below, that the order of April 30, 1936, deprives them of their right to a hearing, on the ground that the order requires reductions in the coke rates from the South to *every* destination in central territory, whereas there were in issue in I. & S. 3985 only the suspended rates which applied to a limited number of points in central territory.

This allegation is based upon appellants' own interpretation of the order, which is erroneous. The order prescribes coke rates from the southern producing points "to destinations in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan." The order was issued with the report, and as a part thereof, and the report and order are to be read together. The numerous destinations involved are not set out specifically either in the report or the order, but the report makes it clear that the only destinations involved were those to which the suspended rates applied; and the report further makes

it clear that the suspended rates applied only to destinations on such of the lines in the four States mentioned as had restricted their concurrences. (R. 18–19)

The suspended rates were described at the beginning of the report, which shows that the rates under consideration were those contained in schedules filed to become effective May 1 and August 3, 1934, "by which respondents proposed to increase the rates on coke from the Birmingham, Ala., district, hereinafter referred to as Birmingham, and from origins on the lines of the Louisville and Nashville Railroad Company and the Interstate Railroad Company in Wise County, Va., and to make reductions and increases in rates from Chattanooga, Tenn., *to destinations* in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan."

The findings in the report of April 30, 1936, indicate that the report and order dealt only with the rates "from and to the points under consideration," i. e., from and to which the suspended rates applied, especially that part of the ultimate finding (R. 37) which reads:

> The orders entered in *Coke Between Points in Central and Illinois Territories, supra,* and the orders entered in the original report herein, to the extent that they require the establishment and maintenance of rates on coke, in carloads, *from and to the points under consideration,* which are higher than those prescribed herein for application from

and to the same points, should be, and they are hereby, vacated and set aside.

Thus, the destinations covered by the order are clearly those referred to in the report, rates to which were suspended. It follows that appellants' interpretation of the order as covering every destination in central territory is erroneous and unwarranted.[8]

The situation here is similar to that dealt with in *American Express Co.* v. *Caldwell*, 244 U. S. 617, 626–627, under the heading "The scope of the order." The order there involved, making requirements respecting rates to "points in the State of South Dakota" was interpreted by this Court as not including all points in the State but only those referred to in the Commission's report. The Court said "the order explicitly makes the report which is filed therewith a part thereof," and this is true here. The opinion there further states that "if an order is believed to lack definiteness an application should be made to the Commission for further specifications." If appellants here had been in doubt as to the scope of the order they should have made application to the Commission for further specifications. Relevant here also is the opinion in

[8] It may be noted that central territory, described above, page 4, includes portions of New York, Pennsylvania, West Virginia, and Kentucky, whereas the order here involved prescribes rates only to destinations in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan. For convenience we have referred to this latter territory as "central territory," but of course it is only part of central territory.

Georgia Comm. v. *United States,* 283 U. S. 765, 772, in which this Court stated:

> The order here challenged is state-wide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully drawn order, otherwise valid and practicable of operation over a wide territory. The appropriate remedy under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 627. Such specific order, if appropriate for review under the Urgent Deficiencies Act, could be dealt with by the courts without interfering with the operation of the order as a whole or with the flexible administrative processes by which it may from time to time be modified. Compare *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 591; Interstate Commerce Commission Rules of Practice, Rule XV (c); and the practice in *State Corporation Comm.* v. *Aberdeen & Rockfish R. Co.,* 136 I. C. C. 173; 161 I. C. C. 273, 286; 165 I. C. C. 31; 169 I. C. C. 728; *Southern Class-Rate Investigation,* 100 I. C. C. 513; 109 I. C. C. 300; 113 I. C. C. 200; 128 I. C. C.

567; *Eastern Class-Rate Investigation*, 164 I. C. C. 314; 171 I. C. C. 481.

In connection with this contention the question arises whether appellants are now entitled in this Court to urge deprivation of hearing in the absence of complaint by them in this regard either to the Commission or in their bill of complaint in the court below. Although under section 16a appellants have the right to apply to the Commission for a rehearing in any case, and under the Commission's Rules of Practice, Rule XV, they had the right to apply "for further hearings, rehearings, reargurments, reconsideration, or modification of orders," they filed no such application after the issuance of the order of April 30, 1936.[9] Thus they failed to call to the Commission's attention the scope of the order, as they interpreted it, and failed to give to the Commission the opportunity to correct the order, if it needed correction, or to issue an official interpretation of the order, if appellants were in doubt as to its scope.[10] *They made no ap-*

[9] This was found by the court below, finding No. 15, which reads:

"15. Plaintiffs herein, as respondents before the Commission in said Investigation and Suspension Docket No. 3985, filed no petition or other request for rehearing or reconsideration of the decision and order of April 30, 1936, in said proceeding."

[10] At the argument in the court below counsel for appellants urged that the prescribed interterritorial rates were not the same as the rates applying within central territory, calling attention to the fact that rates from origins in central territory to "Zone C" in Michigan, embracing the northern

plication for a further hearing. Instead they published rates in accordance with the prescribed scale, apparently to all destinations in central territory and made said rates effective August 13, 1936, as found in finding No. 6 of the court below. August 13, 1936, was the effective date specified in the order of April 30, 1936. The order itself gave approximately three and one-half months' notice and appellants had ample time to file application with the Commission for a further hearing or for an interpretation or modification of the April 30 order. They still have that right. It would thus seem to follow that if appellants were entitled to a further hearing, they waived that right.

It is anomalous, too, that appellants urge this as their primary and apparently principal contention in their brief here when they made no appropriate allegation in this respect in their bill of complaint. No more than passing mention was made of the subject at the hearing in the Court below, and then

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part of the Lower Peninsula, were higher than to other parts of central territory. (R. 559) The order prescribing the Column 2 rates for interterritorial application, as drawn, was broad enough to embrace this Zone C, and although counsel for the Alabama shippers pointed out that Zone C is unimportant to the southern shippers, there being practically no movement to that territory from the South (R. 592), the Commission, subsequently to the argument, upon its own motion, issued an amendatory report and order, 219 I. C. C. 425, R. 158–160, making it clear that the order of April 30, 1936, was not to apply to Zone C in Michigan.

only in appellants' *rebuttal* argument. (R. 608–609) [11] In requests for findings, submitted after the trial, appellants asked the Court to make a finding on the subject (R. 175) but this was objected to by defendants on the ground that it went "beyond the allegations in the bill of complaint, there being no allegation therein that the Commission dealt with rates that were not in issue," (R. 184) and the court made no finding on the subject.

Because of appellants' failure to draw the Commission's attention to the scope of the order as they apparently interpreted it, by way of petition for rehearing or modification or clarification of the order, and because of their failure properly to plead the subject in the court below, they should not be permitted, we submit, to urge the point in this Court, and it should be rejected on this ground.

In *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 82 L. Ed. 205, decided December 6, 1937, after referring to "The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity, *Goldsmith* v. *United States Bd. of Tax Appeals,* 270 U. S. 117; *Porter* v. *Investors Syndicate,* 286 U. S. 461; *P. F. Petersen Baking Co.* v. *Bryan,* 290 U. S. 570; see

[11] Appellants have incorporated in the record here all the colloquies and arguments in the court below. R. 198–201; 414–416; 548; 555–613. The argument of counsel for appellants [Mr. Day] appears at R. 555–573, and in rebuttal at R. 605–609.

United States v. *Illinois C. R. Co.*, 291 U. S. 457," this Court said:

> The extent to which a Federal court may rightly relax the rule where the order of the administrative body is assailed in its entirety, rests in the sound discretion which guides exercise of equity jurisdiction. *Hollis* v. *Kutz*, 255 U. S. 452; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274; cf. *United States* v. *Sing Tuck*, 194 U. S. 161. But there are cogent reasons for requiring resort in the first instance to the administrative tribunal when the particular method by which it has chosen to exercise authority, a matter peculiarly within its competence, is also under attack, for there is the possibility of removal of these issues from the case by modification of its order. Here the commission had authority to pass upon every question raised by the appellant and was able to modify the order. In such circumstances the trial court is free to withhold its aid entirely until administrative remedies have been exhausted.

II

The order is supported by substantial evidence establishing the essential transportation facts, the lower rate levels on coke in the two territories through which the interterritorial traffic passes, and other facts on which the Commission's finding of unreasonableness rests

It is true, as appellants assert, page 25 brief, that in I. & S. 3511 there was an enormous amount

of oral and documentary evidence.[12] This evidence is reflected by the findings in the report of Division 4 in that proceeding. (R. 42–107) After the institution of I. & S. 3985 there was another hearing and much additional evidence was introduced. All parties interested in the rates appeared by their counsel, and 13 witnesses testified, in behalf of the northern railroads, the northern coke shippers, the southern railroads, and the southern coke shippers, and in addition to their oral testimony they introduced 90 documentary exhibits. The testimony, as narrated, is in the transcript. (R–202–414) The documentary exhibits are not printed but are before the Court as original exhibits. (R. 620)

In deciding I. & S. 3985 the Commission gave consideration only to the evidence in that proceeding, and this evidence is reflected by the findings in the first and second reports therein. (R. 15–32; 33–38) It shows, among other things, the essential transportation facts, such as the points of origin and destination, the routes of movement, the distances, volume of the traffic, character and value of the commodity, transportation conditions, and competitive and other conditions in the coke industry. It also shows the history of the rates, the rates then in effect, the suspended rates, the rates proposed by the southern carriers, i. e., the Column 2 scale, the Column 3 scale, and the revenues of the

[12] The evidence in 3511 was not introduced in the court below and is not before this Court.

carriers from the interterritorial coke traffic under the then-present rates, under the proposed Column 2 rates and under the Column 3 rates, and much else.

In addition, it contains voluminous comparisons of the rates in issue with other rates, and especially rates on coke. Of these comparisons, three are of outstanding importance.

1. Evidence showing the undisputed fact that the interterritorial rates on coke were higher, mile-for-mile, than the coke rates generally in effect throughout central and Illinois territories. These rates were prescribed by Division 4 of the Commission in *Coke between Points in Central and Illinois Territories, supra,* and are evidently satisfactory to the carriers, since they have made no complaint against them; and it may be noted that the Column 2 scale as so prescribed involved both increases and reductions and had for its purpose a uniform adjustment without materially increasing or decreasing carrier revenue. (R–84)

2. Evidence showing that the coke rates in effect throughout southern territory, voluntarily established and maintained by the carriers, averaged the same as the central territory coke rates then in effect. This evidence was introduced by witness Behring, Commerce Agent, Southern Railway System, in the form of an exhibit (Ex. 3), in reference to which he stated (R. 222):

> Exhibit No. 3 is a statement of four pages showing the rates between points within the

South compared with the C. F. A. scale of I. & S. Docket 3511. The stations are shown by states. The destinations are those with a population of 5,000 and over, so that there has not been any hand-picking of the points to be shown. It gives a complete picture of the coke rate adjustment in the South.

The exhibit itself shows the rates from Birmingham and Chattanooga to the many destinations in Virginia, North Carolina, South Carolina, Georgia, Tennessee, Alabama, Mississippi, Louisiana, Florida, and Kentucky, and also three points on the north bank of the Ohio River reached by the southern lines, namely, Cincinnati, Ohio, Evansville, Ind., and Cairo, Ill.; shows the distances to each point, and the then-existing rate on coke, and, by way of comparison, the Column 2 scale rate for the same distance in each case. The averages of the rates are determined and the result shows that the average of the existing coke rates in the South was exactly the same as the average of the Column 2 rates applied between the same points. In other words, if the Column 2 rates had been in effect between all these points in the South, their average would have been exactly the same as the existing rates.

3. Evidence showing that the interterritorial rates in question were on a higher level than a great many other interterritorial rates on coke from the South to portions of central and Illinois territories, namely, to many points in Indiana and Illinois.

This anomalous situation was brought about by the fact that many of the northern carriers did not restrict their concurrences, with the result that existing interterritorial rates lower than the Column 3 scale continued in effect to points on those lines. (R. 262, 263, 264, 272–273, 276, 294–295)

Exhibit 89 shows that 54 carriers whose lines lie wholly or in part in the four States mentioned did not restrict their concurrences. Some of these lines were: Akron, Canton & Youngstown; Alton; Ann Arbor; Atchison, Topeka & Santa Fe; Chicago & Eastern Illinois; Chicago & North Western; Chicago, Burlington & Quincy; Chicago Great Western; Chicago, Milwaukee, St. Paul & Pacific; Chicago, Rock Island & Pacific; Cincinnati & Lake Erie; Detroit & Mackinac; Elgin, Joliet & Eastern; Illinois Central; Pittsburgh & West Virginia; Toledo, Peoria & Western; Wheeling & Lake Erie.

The Commission's finding in this regard reads as follows (R. 18–19):

> The carriers in Illinois territory that serve southern origins or have direct connections with such carriers, and the western trunkline carriers operating in Illinois and Indiana, such as the Illinois Central Railroad Company, the Chicago & Eastern Illinois Railway Company, the Chicago & North Western Railway Company, and the Chicago, Burlington & Quincy Railroad Company, did not cancel their general concurrences, and the suspended schedules do not propose to establish the column 3 rates over

> such routes. The result is that, if the suspended schedules are found justified, rates to some points in Illinois and Indiana, including Chicago, will be available, that are lower over some routes than others. For example, the rate from Chattanooga to Chicago over the Illinois Central Railroad Company will be $4.16 and over other routes $4.55.

From Birmingham to Chicago, as another example, the coke rate in effect at the time of the Commission hearing was $4.30 over all routes. (R. 20) As the result of the restrictions in the concurrences of some of the lines, like the New York Central, the Pennsylvania, the B. & O., etc., a rate was published from Birmingham to Chicago over routes formed by their lines at $4.70. This and all similar rates were suspended. But the lower rate of $4.30, applicable over other routes, formed by lines like the Illinois Central, C. & E. I., Burlington, etc., remained in effect.

It is obvious, too, that to *local* points on the lines of these northern carriers that did not restrict their concurrences; interterritorial rates lower than the Column 3 rates remained in effect. For example, the Chicago & Eastern Illinois, having lines from Evansville, Ind., Joppa, Ill., and St. Louis, Mo., to Chicago, kept the lower interterritorial rates in effect to numerous points, local as well as joint, in Indiana and Illinois. This is also true of the Illinois Central, having lines from New Orleans to St. Louis, Louisville, Indianapolis, and

Chicago. This is also true as to the Burlington, which operates lines from Paducah, Ky. (opposite Metropolis, Ill.), and St. Louis to Chicago. This is also true as to the line of the Southern Railway through Indiana and Illinois to St. Louis, and many others that could be mentioned. (R. 264, 295)

Another subject covered by the evidence is also of importance, i. e., the revenue effect of the proposed rates. This evidence is reflected by the tables appearing in the Commission's first report and reproduced at R. 22, 23. The table appearing at R. 22, covering the traffic from Birmingham in 1933, is taken from Exhibit 61, referred to in R. 361, while the table on the following page covering the traffic from Chattanooga during 1929, is covered by Exhibit 59, R. 360. These tables show the tons of coke shipped from Birmingham and Chattanooga to Illinois, Indiana, Ohio, and Michigan, and the Ohio River crossings, giving the totals including and excluding these crossings. It seems more appropriate to take the figures excluding the Ohio River since these Ohio River crossings are reached and served by southern lines.

The revenue upon all shipments from Birmingham to the destination territory, excluding Ohio River crossings, during the year 1933, aggregated $511,709.92. The rates effective March 15, 1934, if applied to the same shipments would have resulted in an aggregate revenue of $508,135.32.

The Column 2 scale, if applied to the same shipments, would have aggregated $484,974.97. (R. 22, 360, 366–367, Ex. 61)

The rates from Chattanooga to central territory in effect prior to March 15, 1934, as applied to the tonnage from Chattanooga in 1929, resulted in an aggregate revenue of $206,744.24. The Column 2 scale applied to that tonnage aggregates $228,-791.07. (R. 23, 360, 366–367, Ex. 59)

There was much additional evidence, but that referred to above is sufficient to show that it was substantial, and thus meets the rule of this Court, as expressed in *I. C. C.* v. *Union Pacific R. R.*, 222 U. S. 541, 547–548:

> Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

Here the Commission was dealing with traffic that passes through two territories. The reasonableness of the rates on that traffic was one of the issues, and evidence was introduced tending to show that such rates were unreasonable when compared with lower rates on the same commodity in effect in both of the territories through which the interterritorial traffic passes. This evidence estab-

lished that the interterritorial rates were 10% higher than the general level of coke rates in both southern and central territories.

It is settled by many decisions of this Court that such rate comparisons may be accepted as evidence of probative value in proving the unreasonableness of rates. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 98; *Louis. & Nash. R. R.* v. *United States*, 238 U. S. 1, 11, 15; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 565; *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, 480–481; *Western Chem. Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Ry.* v. *United States*, 272 U. S. 658, 665–666.

In the northern territory the comparative rates had been prescribed by the Commission, Division 4; those in the South were voluntarily established and maintained by the carriers.

In *Louis. & Nash. R. R.* v. *United States, supra*, at pages 15–16, sustaining the validity of an order of the Commission prescribing a reduction in the coal rate from Kentucky mines to Nashville, Tenn., based largely on proof showing that the Nashville rate was higher than that charged for a similar haul to other points, the Court said:

> Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when

> to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate.

In *Skinner & Eddy Corp.* v. *United States, supra,* the Court said, at page 565,

> * * * low rates, because voluntarily established by the carrier, may be accepted by the Commission as evidence that other rates, actual or proposed, for comparable service are unreasonably high. *Board of Trade of Carrollton, Ga.,* v. *Central of Georgia Ry. Co.* 28 I. C. C. 154, 164; *Sheridan Chamber of Commerce* v. *Chicago, Burlington & Quincy R. R. Co.,* 26 I. C. C. 638, 647. Compare *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, 11 et seq.

Under the above authorities the Commission could accept the evidence showing such comparative rates and ascribe to it such weight as in its judgment seemed proper. There was a great deal of other evidence, and in determining the question of reasonableness the Commission weighed all the evidence, ascribed great weight to the comparative level of rates on the same commodity within the two territories through which this traffic passes and reached the conclusion that the interterritorial rates were unreasonable.

That the weight of the evidence was for the Commission has been held many times by this Court. *Ohio* v. *United States,* 292 U. S. 498, 506; *Assigned Car Cases,* 274 U. S. 564, 580–581; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *St. Joseph Stock Yards Co.* v. *U. S.,* 298 U. S. 38, 50–51, and cases cited.

The facts shown above are not disputed by the appellants. Their contention, as we understand it, is not that there was no evidence to support these and other facts found in the Commission's reports, but rather that the evidence establishing those facts is insufficient to support the Commission's conclusion that the rates in question were unreasonable. Such a contention necessarily invites the Court to examine all the evidence, appraise it, and hold that the Commission erred in its judgment as to the facts. This Court has often said that it has no such power. *Ohio* v. *United States,* 292 U. S. 498, 506; *Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *Los Angeles Switching Case,* 234 U. S. 294, 314; *Western Chem. Co.* v. *United States,* 271 U. S. 268, 270–271.

III

The order is not contrary to the "manifest weight" and "indisputable character" of the evidence

In section II of their brief appellants contend that the Commission's order, requiring "drastic" reductions "in all coke rates from southern points to central territory destinations," is "against the

manifest weight and the indisputable character of the evidence."

It seems important to point out, first, that no reduction was more than 10%, and that the rate changes resulting from the order were not all reductions but in many instances were *increases*, especially from Chattanooga.[13] This is reflected by a table in the first report (R. 20) showing the then-present rates and the Column 2 and Column 3 rates from Chattanooga and Birmingham to *representative* points in the destination territory. While all the then-present rates there shown from Birmingham were higher than the Column 2 rates, and the Column 2 rates resulted in reductions, many of the rates from Chattanooga were lower than Column 2, and the revision of the rates on the Column 2 basis resulted in increases. This is true as to Detroit, an important market, to which the then-present rate from Chattanooga was $3.65, whereas the Column 2 rate was $4.15. Other typical increases were: To Grand Rapids, Mich., $4.16 to $4.25; to Jackson, Mich., $3.91 to $4.05; to Columbus, Ohio, $3.28 to $3.65; to Springfield, Ohio, $3.28 to $3.45; to Dayton, Ohio, $3.28 to $3.35.

Although the Column 2 scale was prescribed for interterritorial application only as maxima, and

[13] There were also many increases in the rates from Wise County, Va. (R. 23) The tonnage from Wise County, Va., where beehive coke only is manufactured, has greatly declined in recent years (R. 309) and the tonnage now is so small as to be unimportant. For this reason the rates from Wise County, Va., are largely neglected in this brief.

did not *require* any increases, yet it was thoroughly understood that if the scale were approved, all rates would be revised to conform strictly thereto. Witness Burke, testifying on behalf of the Nashville, Chattanooga & St. Louis Railway, stated (R. 260):

> It is my position that the rates from Chattanooga to destinations in Illinois and Central Freight Association territory should not exceed the rates made on basis of the so-called Central Freight Association scale 2 as shown in Appendix 8 of the decision in I. & S. Docket 3511. Now in advocating the Central Freight Association scale from Chattanooga to the northern destinations, we are advocating it not only where it will produce increases but also where it will produce reductions in the existing rates from Chattanooga to the destinations in question. It is therefore correct to say that we are opposed to the suspended rates and in lieu thereof propose for application from Chattanooga to Central Territory the same level of rates as apply within Central Territory.

A little later in his testimony witness Burke further states (R. 265–266):

> Detroit is one of the most important points of destination for Chattanooga, Tennessee. There we have the present rate from Chattanooga to Detroit of $3.65 per ton. Under the suspended basis the rate would be $4.55 per ton. Under the basis we have proposed here the rate would be $4.15 per ton. Even under our proposed basis the rate from Chat-

tanooga to Detroit will be increased fifty cents per ton.

As to the rates from Birmingham: Those actually in effect at the time of the hearing were within the range of the Column 2 and Column 3 scales. "That is to say, to the destinations involved in I. & S. Docket 3985 the present rates from Birmingham are no lower than the Column 2 scale, and no higher than the Column 3 scale * * *." (Witness Roby, Vice President, L. & N. R. R., R. 284) Thus the Commission's order required no change from Birmingham where the rate was then on the Column 2 basis, and required reductions, ranging up to but not in excess of 10%, where the rate was higher than Column 2.

Coming now to appellants' main contention under this caption: They assign six reasons to support the contention, brief, pages 27–28, the first of which is "(a) The basis of interterritorial coke rates contended for by appellants was that fixed by the Commission on a comprehensive record and at the same time as the basis applying within central territory was prescribed by the Commission."

The reference is to *Coke between Points in Central and Illinois Territories,* 194 I. C. C. 640, in which Division 4 prescribed the Column 2 scale for application within central territory and the Column 3 scale for interterritorial application from the South. Later, the interterritorial rates came before the Commisison in *Coke from Alabama and Tennessee to Central Territory,* I. & S. 3985, and the Commission overruled Division 4 as to the inter-

territorial rates, prescribing, under the evidence before it, as adduced in the hearing in I. & S. 3985, the Column 2 scale for application from the South to central territory. While technically the proceeding before the Commission was not a rehearing under section 16a, in substance it was such a rehearing, in which the Commission could exercise an independent judgment and reach a different conclusion from that of Division 4. As stated in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482:

> The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361.

The fact that the Commission reached a different conclusion from that of Division 4 obviously does not show that the Commission's order is contrary to the weight of the evidence.

Appellants' contention in this regard contains a significant admission. It admits that appellants

"contend for" the Column 3 scale for interterritorial application. Appellants do not challenge the Division 4 order prescribing the Column 3 interterritorial scale. They attack the Commission's orders in I. & S. 3985 first prescribing for interterritorial application the Column 2 scale plus arbitraries, and then on reconsideration the Column 2 scale without arbitraries. As before shown, the Column 3 rates were 10% higher than the Column 2. Thus while assailing the validity of the order prescribing the Column 2 scale, they have no objection to rates 10% higher. But they do not allege that the Column 2 scale is confiscatory. It would thus seem that what they actually ask this Court to do is to rule that this interterritorial traffic should take the original Column 3 basis prescribed by Division 4 and not the Column 2 basis prescribed by the Commission. Since this is peculiarly an administrative question, it follows that appellants' request is in reality one that merely asks the Court to perform an administrative function, i. e., to determine which of the two scales should apply to this interterritorial traffic.

Appellants' second reason is "(b) The abundant and uncontroverted evidence offered by central territory railroads and shippers before the Commission to prove that the I. & S. Docket 3511 basis they are contending for was not unreasonably high but actually lower than it might properly be. (R. 204, 338, 368, 390, 394)."

The record citations refer to the evidence of the four witnesses who testified in behalf of the central territory carriers and coke shippers. But their evidence does not stand uncontroverted. Evidence to the contrary was given by the eight witnesses who appeared in behalf of the southern carriers and coke shippers, particularly witnesses Behring (R. 222–246); Burke (R. 260–283); Roby (R. 284–308); Widell (R. 314–333); Ribe (R. 356–368, 403–411). In general it may be stated that the northern railroads and coke shippers submitted evidence tending to show that the Column 3 scale would be reasonable, non-preferential and non-prejudicial for interterritorial application, while the southern carriers and shippers submitted evidence tending to show that those rates would be unreasonable, unduly preferential of the northern shippers and unduly prejudicial to the southern shippers, and that the Column 2 scale would be just, reasonable and otherwise lawful for interterritorial application.

The evidence was conflicting; its weight was not "manifest" and its character not "indisputable". It is established that in cases of this kind the courts will not weigh the evidence or attempt to settle conflict in the testimony. As said in *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 100:

> The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary

> but sustained by substantial, though conflicting evidence. *The courts cannot settle the conflict* nor put their judgment against that of the rate-making body * * *. [Italics supplied.]

See also *Illinois Cent. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 446; *Louis. & Nash. R. R. Co.* v. *United States*, 245 U. S. 463, 466; *Warehouse Co.* v. *United States*, 283 U. S. 501, 508.

As the third reason appellants state:

> (c) Coke rates of appellants and other railroads, prescribed by the Commission for application on their lines between points in the North (*Standard Gas Equipment Corp.* v. *Lehigh Valley R. Co.*, 160 I. C. C. 4; *Hudson Valley Coke & Prod. Corp.* v. *N. Y., N. H. & H. R. R. Co.*, 129 I. C. C. 472; *Coke Producers Asso. of Connellsville* v. *B. & O. R. R.*, 27 I. C. C. 125, and other cases) were shown to be materially higher than any of the three reduced coke rate scales ordered to be established from the South to destinations in central territory. (R. 52–53)

The record citation is to the report of Division 4 in I. & S. 3511, where those cases are cited, discussed and distinguished. In the last-cited case the Commission prescribed years ago the Connellsville coke scale (R. 50), which was rejected by Division 4 as obsolete. (R. 84)

Their fourth reason is:

> (d) Admissions of witnesses for the southern interests that the I. & S. 3511 rates were

not in excess of reasonable maxima. (R. 244, 245, 279, 289, 335–6)

The witnesses referred to are Behring, Commerce Agent, Southern Railway System; Burke, Commerce Agent, Nashville, Chattanooga & St. Louis Railway; Roby, Vice President in Charge of Traffic, Louisville & Nashville Railroad; and Kerr, Vice President, Louisville & Nashville. Witnesses Behring, Burke and Roby introduced substantial evidence bearing on the reasonableness of the rates in issue. (R. 222–246; 260–279; 284–308) Behring showed that the coke rates in effect throughout the South averaged exactly the same as the Column 2 scale in central territory (R. 222), and, with the thought that

> It would seem proper with that showing that the rates from the South to Central Territory might reasonably be not higher than the scale applying in Central Territory * * *, (R. 222)

he proposed, on behalf of the Southern Railway System, the Column 2 rates for application from the South to all destinations in central territory (R. 225) as reasonable rates (R. 227). He then proceeded to give extended additional testimony and introduced six exhibits, in support of his proposal.

On cross-examination he was asked if he considered the suspended rates to be unreasonable *per se*, i. e., considered in and of themselves and with-

out regard to comparative rates or competitive conditions or whether traffic would move under them. He refused to admit that the rates would be unreasonable *per se*. (R. 244–245) The effect of these statements is that if the relevant conditions, which must be considered in fixing rates, were different, different rates might be proper.

Since the weight of the evidence as a whole was for the Commission, it of course could, even though all the carriers contended that the Column 3 rates were reasonable, find them unreasonable on the evidence. The situation is analogous to that in *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, in which the Court said, at page 549:

> But the absence of direct testimony that the 50 cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40 cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

Cf. *Interstate Comm. Com.* v. *Chic., R. I. & Pac. Ry.*, 218 U. S. 88, 98, 101, 102–103, 110–111; *Ohio* v.

United States, 292 U. S. 498, 506, 508; *Chicago, R. I. & P. Ry. v. U. S.*, 274 U. S. 29, 33–34.

Appellants' fifth reason is that "at the oral argument before the Commission not a single advocate out of the four appearing for the southern shippers and railroads contended that I. & S. Docket 3511 interterritorial rates were unreasonably high." This statement, if true, would not seem to be of legal significance in a case like the present where the proceeding was instituted by the Commission itself and where the issue was whether the rates in question were reasonable and otherwise lawful. In such a case the Commission can act upon the *evidence*, irrespective of the position of the parties. But the statement is not true. For example, one of the counsel for the southern railways, while not admitting that the suspended rates were "unreasonable *per se*," stated:

> These respondents take the position that a reasonable basis or a fair and just basis to be applied on this traffic is so-called scale 2 of Appendix 8 of the Coke Case; that is equivalent to a distance scale and these lines and their patrons feel that that is a proper basis to be applied in order to put everybody on a fair basis. (R. 449)

Appellants' sixth and final reason is that "The petitions for modification of the Commission's order filed by the southern shippers (R. 512–548) made no contention that the rates prescribed by the Commission were unreasonable, but, on the con-

trary, in their 'requested specific findings' therein, those interests expressly concede (R. 514, par. 2) that the evidence before the Commission did not warrant a finding that the rates required by the final order of the Commission were as high as reasonable maxima, and went on to say that higher rates should be established only if southern railroads elected to maintain the higher rates. (R. 514, pars. 3–4)" In those petitions the southern shippers urged the Commission to exercise its powers to put them on a rate equality with their northern competitors. They contended the Commission had power to do this under sections 1 (5), 3 (1), and 15 (1). (R. 528) They stressed more particularly section 3 (1) requiring nonprejudicial rates, urging that the lower basis of rates in central territory subjected them to undue prejudice. The Commission's order was based exclusively on section 1. The situation seems to be covered by the holding of this Court in *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U. S. 29, 36–37:

> In disposing of the final objection, little need be said. The contention is that the commission was without power to predicate its order on paragraph (13) of section 6 of the act, because there is no formal reference in the complaint to that paragraph nor an order for an investigation under it on the commission's own motion. But the allegations of the complaint in matters of fact were sufficient to authorize the commission to consider

> the case under that provision as well as others; and this is enough. To plead the law relied on, is no more necessary in a proceeding before the commission than it is in a judicial proceeding.

It would not seem that the legal validity of the Commission's order is to be determined by reference to statements made in petitions for modification. In this proceeding, with the issues as above indicated, the Commission, acting on the evidence, could make its own findings, aside from the requests or contentions of the parties, and here it found, upon adequate evidence, that rates higher than the Column 2 scale for interterritorial application would be unreasonable.

In section III of their brief, pages 29–30, appellants say:

> Statements made by representatives of southern railroads and shippers at the hearing, on oral argument, and in their petitions for modification of the Commission's first decision and order indicate those interests had no intention of attacking as unreasonable *per se* the basis of interterritorial rates prescribed by the Commission in I. & S. Docket 3511 and contended for by appellants. According to the witnesses for the southern producers their position was (R. 367) "that the suspended rates, if approved, would establish undue or unlawful prejudice against us to this territory. Our reasons for that contention is that the grade of the Col-

> umn 2 scale itself is sufficiently high to justify its application from Birmingham."

The quotation is from the testimony, on cross-examination, of witness Ribe, Industrial Traffic Manager, of Alabama Iron & Steel Shippers' Conference. He went on to say (R. 367–368):

> The scale [Column 2] is relatively all right for longer distance[s] and low for short distances. Our position is that that level is too high for transportation within C. F. A. territory for the long hauls, and I think they are low for the short hauls. We contend that the same level of rates should obtain from Birmingham as from C. F. A. points to destinations in that territory, based on transportation conditions and our rate level within the South, our rate level on coke to the Southwest, and on the showing presented in my Exhibit No. 70 also.

Thus, the substance and effect of the witness' testimony was that the suspended rates, on the Column 3 basis, if made effective, would establish undue prejudice against Birmingham shippers, and would be unreasonable to the extent they exceeded the Column 2 basis.

Moreover, on direct examination the witness testified (R. 366):

> Q. Mr. Ribe, the question has just been raised as to the southern shippers desiring rates that are less than just and reasonable rates. I wish you would state the position of the interests for which you appear.

A. The interests for which I appear believe, based on our investigation, for which I have here presented, that the application of Column 2 from Birmingham to Central territory would represent maximum reasonable rates.

Q. Are the interests that you represent asking for anything less than reasonable rates?

A. No, sir.

Whether the parties attacked the rates as unreasonable *per se* is immaterial. It is sufficient if the parties submit evidence tending to show that the rates in issue are "unreasonable" either in and of themselves or by comparison with other rates. The term "unreasonable *per se*" does not appear in the Interstate Commerce Act. The Act requires, in section 1 (5), that all rates shall be "just and reasonable," and prohibits "unjust and unreasonable" charges. Section 15 (1) authorizes the Commission, whenever, after full hearing, it finds any rate to be unjust or unreasonable, to determine and prescribe the just and reasonable rate. There is no requirement that there be either allegation or finding that the rate is unreasonable *per se*. On this subject, the Commission, in *Lackawanna Steel Co.* v. *Director General,* 87 I. C. C. 383, 384, said:

> At the outset it should be noticed that throughout the record it is made very clear that the unreasonableness of which the complainants complain is "relative unreasonableness" as distinguished from "intrinsic"

> or "*per se* unreasonableness," the idea apparently being that a state of facts may be shown which would justify a finding of relative unreasonableness but would not justify a finding of unreasonableness *per se*. We have made use of the term "relative unreasonableness" in other cases. It is well known that substantially all of our findings of unreasonableness are, and must of necessity be, based to a great extent upon a measuring and weighing of the rates attacked with other rates which appear to afford a proper basis of comparison, so that, generally speaking, when we find a rate unreasonable, it is in effect, on account of the method by which our conclusion must be reached, a finding that the rate is unreasonable by comparison or relatively. In arriving at such a conclusion we must, of course, be convinced that the rates cited by way of comparison are properly comparable and that, when given the weight to which they are entitled they sufficiently indicate that the level of the rates attacked is too high. This question calls for the exercise of our judgment upon the particular facts presented.

The Commission has expressed the same thought in many other cases. It has also frequently pointed out that "a proper relationship between competitive groups is in many respects of greater importance to the shipping public than the measure of the rate itself." *Coal from D., T. & I. R. R. Mines*, 64 I. C. C. 564, 566. Evidence such as here presented,

showing *inter alia* the relevant transportation conditions and comparisons with rates on the same or other commodities prescribed by the Commission or voluntarily established by the carriers, is sufficient. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541; *Louis & Nash. R. R.* v. *United States*, 238 U. S. 1, 15–16; *Virginian Ry.* v. *United States*, 272 U. S. 658.

The statement in appellants' brief, page 30, that the Commission's report itself indicates that commercial, and not traffic or transportation, conditions led the Commission to order a reduction in coke rates from the South, implies that the Commission improperly considered the following facts found in the report (R. 35):

> The southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the Column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect.

These were but a few of the many facts found in the Commission's reports, to which reference has been hereinbefore made, *supra*, pages 11–15. The Commission's conclusions and order were of course based upon all the findings and therefore it cannot be said that the order is predicated solely upon

the above-quoted findings which appellants say reflect "commercial" conditions. Hence the question really is whether the Commission committed error of law in considering these facts as to so-called commercial conditions along with all the other facts established by the evidence. The answer, we think, is not difficult. In *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, involving the joint resolution of Congress of January 30, 1925, known as the Hoch-Smith Resolution (c. 120, 43 Stat. 801, 49 U. S. C., sec. 55), the Court said, pp. 666–667:

> The resolution is in three paragraphs. The first declares it to be a true policy in rate making that the conditions which at any given time prevail in the several industries "should be considered" in so far as it is "legally possible" to do so, to the end that commodities may move freely. This policy is not new.. In rate making under existing laws it has been recognized that conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness; and it also has been recognized that so far as can be done with due regard for the interests affected rates should be such as will permit the commodities to which they relate to move freely in the channels of commerce.

Cf. *Int. Com. Comm.* v. *Union Pacific R. R.,* 222 U. S., at 553–555.

Section 15a (2), added to the Act after the decision in the *Ann Arbor* case, not only permits but requires that the Commission, in the exercise of its power to prescribe just and reasonable rates, shall give due consideration, among other factors, to the effect of rates on the movement of traffic.

IV

The Commission's order, in prescribing interterritorial rates equal mile-for-mile to those prevailing throughout central territory, required equality of rates under similar conditions, and is not void on the ground that it merely equalized geographical and transportation disadvantages. It is a valid exercise of the Commission's power to prescribe reasonable rates

The substance of appellants' argument under this caption is that in requiring interterritorial rates from the South to central territory equal mile-for-mile to those in central territory the Commission merely attempted to equalize the geographical and transportation disadvantages of the producers of coke in southern territory where transportation conditions are less favorable. It is true that general transportation conditions in southern territory are not as favorable as in central territory and that considered as a whole southern is a higher-rated territory than central. But the Commission finds *this is not true as to coke.* It found, as already shown that—

> Coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory. (R. 36)

Coke transported from the South to central territory moves every mile of the way through territory in which the prevailing coke rates are approximately the same as the Column 2 scale. To prescribe the Column 2 scale for interterritorial application between two territories in which the rates on the same commodity are approximately the same as the Column 2 scale seems obviously not to equalize geographical and transportation disadvantages, but only to require an equal rate under similar conditions and thereby remove an artificial, unjustified *rate* disadvantage.

The Commission's report indicates the southern producers are under a geographical disadvantage in marketing coke in central territory. It found: "The average haul in central territory is 100 miles. Before the southern shippers can reach central territory they have to pay for hauls of 311 miles from Chattanooga and 330 to 481 miles from Birmingham to the Ohio River." (R. 27) To charge a disproportionately high rate for these long hauls would add a second disadvantage, an artificial rate disadvantage, to the natural disadvantage in distance under which they now labor. As expressed by witness Roby, L. & N. Vice President:

> As is well known, these by-product plants are scattered all over C. F. A. Territory. This close proximity of northern producers to the points of consumption gives such northern producers an enormous advantage over the southern producers. The southern

> producers, by reason of the greater haul involved in order to get their product to the northern market, to begin with, encounter a natural handicap in distance, but we feel that this disadvantage should not be compounded by requiring southern shippers to pay a freight rate which, for their longer haul, is disproportionate to the freight rate assessed against the shipper in close proximity to the markets having the natural advantage in distance. (R. 287)

The rate adjustment on coke is not a "group and differential" adjustment, such as frequently applies in the case of bituminous coal, cf. *Ohio* v. *United States*, 292 U. S. 498, 502, but is based on a distance scale. The distance scale prescribed by the order here in question had its origin in *Indiana Coke & Gas Co.* v. *Ahnapee & W. Ry. Co. et al.*, 155 I. C. C. 70, decided March 14, 1929, involving rates on coke from Terre Haute, Indianapolis, Chicago, and Milwaukee to destinations in western trunk line and Illinois freight association territories. The scale there prescribed, called the "i. f. a." (Illinois Freight Association) scale, was used as a basis for the Column 2 scale prescribed for application within central territory in I. & S. 3511. The i. f. a. scale was modified, however, so as to preserve carrier revenue. (R. 86) This Column 2 scale is the same scale as that prescribed by the order here involved. In its report in the *Indiana Coke* case, *supra*, after pointing out that "additional coke plants are being built throughout the

country quite rapidly" and that "competition between the various producers is keen," the Commission said:

> When generally speaking a commodity may be shipped from nearly anywhere to nearly everywhere, a distance scale seems peculiarly appropriate to assure equality of opportunity for all producers, prospective as well as present, and like opportunity for all consumers. * * *

The order here in question attains this end, and, we submit, is not void as equalizing geographical and transportation conditions, as appellants urge, but is a valid exercise of the Commission's power to prescribe reasonable rates. *Interstate Comm. Com.* v. *Chic., R. I. & Pac. Ry.,* 218 U. S. 88, 102–103; *Int. Com. Comm.* v. *Union Pacific R. R.,* 222 U. S. 541, 550, 554–555; *Louis. & Nash. R. R. Co.* v. *Garrett,* 231 U. S. 298, 313; *Northern Pac. Ry.* v. *North Dakota,* 236 U. S. 585, 598–599; *Chicago, R. I. & P. Ry.* v. *U. S.,* 274 U. S. 29, 32–33; *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 362.

V

In testing the reasonableness of the interterritorial rates from the South the Commission did not proceed under erroneous constructions of law or misapprehension in respect of its powers

In arguing that the Commission misconstrued the law and misapprehended its powers (brief, section V, pp. 46 et seq.) appellants assert that the *sole*

ground for the reductions required was the level of rates prevailing between points in central territory. From this premise, shown herein to be erroneous, the argument proceeds with the assertion that this was a departure from long and well-recognized standards of rate determination, was wholly without legal sanction, and was contrary to principles theretofore frequently enunciated by this Court, and generally followed by the Commission as shown by the fact that the printed volumes of the Commission's reports are full of cases dealing with similar interterritorial rates between the North and South, in which the Commission, in view of the more favorable traffic and transportation conditions in the former, had found that interterritorial rates should be higher than the basis which it had prescribed for application within the North.

The argument is unsound for the reason that the lower level of rates prevailing within central territory, while an important fact to which the Commission could and did ascribe great weight, was not the *sole ground* for the prescription of interterritorial rates on the same level as the central territory rates. In addition to the existence of the lower level of coke rates in central territory there was also the important fact that the interterritorial rates were likewise higher than the average of the coke rates generally prevailing throughout the South. This was found by the Commission, as already observed, and the report shows that the Com-

mission gave this fact considerable weight. It said:

> Too much weight was given in the prior report to the absence of the specific data referred to, and not enough to the established rate adjustments in *southern* and *central* territories, and the effect rates have on the interterritorial movement of traffic. * * * (R. 36)

Appellants' intimation that in all cases passed upon by the Commission involving north-south rates the Commission has uniformly prescribed higher interterritorial rates than those within the North, is shown to be erroneous by the report in the present case. In this report the Commission states that it has, "in several cases where competitive conditions are somewhat analogous to those here indicated, prescribed rates from origins in western trunk line and *southern* territories to official territory on the basis of the scales that apply in official territory" (R. 36), and that in *Cotton, Woolen, and Knitting Factory Products,* 211 I. C. C. 692 [decided November 21, 1935], in discussing the relation which the rates from the South to the North should bear to those within the North, it said:

> In determining these various controversies our approach has been consistently confined to the particular problem before us. * * * Whether a particular relation is unduly prejudicial to the North or to the South, and what

> change in the relation is necessary to correct the situation, is a matter of judgment on all the facts, and that judgment will lead to different results as the circumstances shown of record vary, either because of the passage of time or because different commodities are considered. (R. 37)

The fact that transportation conditions in general are more favorable in official territory than in the South (R. 36) was given due consideration by the Commission, and it differentiated as between general transportation conditions in the South and those surrounding the particular commodity in question. It held that the following pronouncement by Division 4 in *Coke Between Points in Central and Illinois Territories, supra,* while sound as a general proposition, should not in its judgment be applied in this case:

> We have recognized in numerous cases that from a rate-making standpoint southern territory is rated higher than central territory. The evidence of record indicates that the traffic density in the former is substantially less than in the latter. Where we have prescribed interterritorial rates that did not reflect this difference, special circumstances surrounding the traffic accounted for the exception.
>
> * * * * *
>
> It is true that the traffic density on the Louisville & Nashville and the Cincinnati, New Orleans & Texas Pacific, which haul a large

> portion of this traffic, compares favorably with that on lines in central territory. But in fixing interterritorial rates due consideration must be given to the adjustment as a whole, else by piecemeal revision the whole structure will be undermined. The objective must be such uniformity as will be conducive to the widest competition among shippers in a given territory, and the preservation of carrier revenue predicated upon recognized differences in territorial rate levels. Rates made to correspond closely to traffic density on particular lines would render impossible the achievement of this result. (R. 25–26)

In holding that these considerations should not be applied here, the Commission said:

> The above pronouncement is sound as a general proposition, but we do not believe it should be applied here. Coke is shipped to central territory only from a few southern origins and moves only over main arteries on which the traffic density is much heavier than that in the southern territory as a whole. The entire adjustment, to the extent that it is of interest to manufacturers or shippers of coke in southern and central territories, is before us, and there is no contention that the column 3 rates are necessary to preserve the carriers' revenues. On the contrary, the southern carriers are convinced that the column 3 rates would restrict, if not prevent, the movement of southern coke to central territory, and the evidence of the

> Chattanooga and Birmingham manufacturers is to the same effect. Under the circumstances the consideration of transportation conditions may well be confined to those actually encountered. (R. 26)

In these circumstances the statement made in *Illinois Cent. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 466, seems applicable:

> The question submitted to the Commission, as we have said, with tiresome repetition perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact and not of law. It seems from the findings, report and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

The case cited by appellants at brief 48 involving divisions of joint rates, *Atlantic Coast Line R. R. Co. et al.* v. *Arcade & Attica R. R. Corp. et al.*, 194 I. C. C. 729, 198 I. C. C. 375, affirmed *B. & O. R. R. Co.* v. *United States*, 298 U. S. 349, related only

to divisions of joint rates on citrus fruit from Florida to points in official territory. It did not involve divisions of joint rates on coke from southern producing points to central territory, and, so far as appears, and so far as we know, there is no proceeding pending before the Commission involving divisions as between the northern and southern carriers of joint interterritorial rates on coke. Section 1 (4) of the Interstate Commerce Act requires all carriers subject thereto "in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers." Under section 15 (6) the Commission is authorized to prescribe "just, reasonable, and equitable divisions" of joint rates. It may not be presumed or anticipated in the event the Commission undertakes to prescribe divisions of the joint interterritorial coke rates in question that it will require other than just, reasonable, and equitable divisions as between the central territory carriers on the one hand and the southern carriers on the other.

(a) The effect of the rates upon the movement of the traffic was properly given consideration in determining the question of reasonableness

The second report shows that in considering the question of the reasonableness of the interterritorial rates the Commission gave weight "to the es-

tablished rate adjustments in southern and central territories, *and the effect rates have on the interterritorial movement of the traffic.*" (R. 36)

The gravamen of appellants' argument at pages 51–57 of their brief seems to be that the Commission should have closed its eyes to the effect of these rates upon the movement of the interterritorial traffic; and they contend that to give consideration to that factor finds no sanction in section 15a (2). This provision, as amended by Emergency Railroad Transportation Act, 1933 (c. 91, 48 Stat. 211, 49 U. S. C. Sec. 15a), provides:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

This section *by its terms* is applicable in all cases where the Commission exercises its power to prescribe just and reasonable rates. It has not been construed as applying only in "general revenue cases," as appellants contend. That the section was intended to apply in the case of individual rates as well as in general revenue cases is clearly indicated by the report of the House Committee, H.

R. No. 193, 73d Cong., 1st Sess., quoted in footnote 3, page 7 of the opinion of this Court in *Florida* v. *United States,* 292 U. S. 1, in which the Committee said, p. 7:

> The rule of rate making as rewritten in the proposed paragraph (2), found in section 205 of the bill, directed the Commission to give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service. *It is difficult to conceive of a reasonable rate which would ignore any one of these considerations.* The Commission as a fair and impartial body acting for the Congress will continue to give consideration to these factors. In the case of the power given to the Commission to prescribe just and reasonable rates the committee does not believe that it is necessary to encumber the statutes with further language which might be mandatory in terms, but which could add nothing further to the plain duty of the Commission under the law, and which might be interpreted to imply a distrust of the Commission in prescribing just and reasonable rates. The Commission will and must give consideration to all facts developed on the record

and see to it that the record is enlightening as to such factors as are mentioned in the first section of this bill. [Italics supplied.]

VI

The findings are adequate

In their brief, section VI, page 59, appellants assert there are no findings in the Commission's reports which can be said to support the finding of unreasonableness. No attempt is made, however, to show wherein the findings are inadequate. The findings have already been reviewed; they seem obviously to be adequate. *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464–465; *Ohio* v. *United States*, 292 U. S. 498, 511; *Florida* v. *United States*, 292 U. S. 1, 9; *United States* v. *Louisiana*, 290 U. S. 70, 80.

As to the alleged lack of findings to indicate that the rates prescribed as reasonable maxima in I. & S. Docket 3511 had become unreasonable: As heretofore shown, the Commission's findings and orders in I. & S. 3985 were based upon the evidence in that proceeding. The latter was in the nature of a rehearing by the Commission of a decision by a division. Section 17 (4) expressly provides that any order of a division is subject to rehearing by the Commission as provided in section 16a. The latter section provides for rehearing by the Commission of a prior decision and it expressly provides that "if, in its judgment, after such rehearing and the consideration of all facts, including those arising

since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly." Cf. *Interstate Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 550; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482. Hence there was no necessity for specific findings on this subject.

There is no showing that this subject was brought to the Commission's attention. The Commission must make the essential quasi-jurisdictional findings in any event, for without such findings it lacks jurisdiction to make the order. But it would seem that no party should have the right in the courts to complain of alleged omissions to make subordinate findings when he has made no complaint to the Commission in that regard. The rule applicable in judicial proceedings which precludes a party from complaining for the first time in an appellate court of alleged errors below would seem to apply in this phase of judicial review of administrative orders. In *Board of Public Utility Com'rs* v. *United States,* 21 F. Supp. 543, the statutory court, in sustaining an order under section 13 (4), so held, stating (page 549):

> Under the Commission's Rules of Practice (Rule XV) it is permissible for any party, after decision, to apply for a rehearing for the taking of additional testimony, for reargument, or for reconsideration. Plaintiff did not apply to the Commission for rehear-

ing in this case. By petition for such rehearing the way was open to plaintiff to urge upon the Commission the argument which it now presents for the first time to the court as to alleged insufficiency of the findings. It should have exhausted its remedies before the Commission before appealing in this respect to the court.

See also *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, *supra*.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

ROBERT H. JACKSON,
Solicitor General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
J. STANLEY PAYNE,
Assistant Chief Counsel, Interstate Commerce Commission.
THURMAN W. ARNOLD,
Assistant Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission,
Of Counsel.

MARCH 1938.

APPENDIX

The Interstate Commerce Act (49 U. S. C.) provides:

SECTION 1

(4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *And provided further,* That nothing in this part shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

SECTION 3

(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 4

(1) That it shall be unlawful for any common carrier subject to the provisions of this part to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part, but this shall not be construed as authorizing any common carrier within the terms of this part to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commis-

sion may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares, or charges existing at the time of the passage of this amendatory part by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

SECTION 15

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint what-

ever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or

circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regula-

tion, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this part, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SECTION 16a

That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such gen-

eral rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

SECTION 17

(4) In conformity with and subject to the order or orders of the Commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the Commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the Commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said

divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the Commission, subject to rehearing by the Commission, as provided in section sixteen–a hereof for rehearing cases decided by the Commission. The secretary and seal of the Commission shall be the secretary and seal of each division thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 638.—October Term, 1937.

Baltimore & Ohio Railroad Company, et al., Appellants, *vs.* The United States of America, Interstate Commerce Commission, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[April 25, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellants, nineteen railroads operating within what is known as Central Territory—Ohio, Indiana, Illinois and Michigan, by their bill filed in the District Court Northern District of Illinois July 22, 1936, challenged the validity of two Interstate Commerce Commission orders affecting the rate structure on coke moving into that territory from southern points. Questions in respect of these rates have often been before the Commission. The court made findings of fact upon the evidence and dismissed the bill without opinion.

The first challenged order, dated March 11, 1935, followed an earlier suspension of certain proposed schedules and an investigation. It cancelled these schedules and determined what thereafter would be maximum reasonable rates upon a mileage basis. Subsequently, the proceedings having been reopened, this order was modified and reaffirmed. In the circumstances we think the court below properly declined to pass upon its validity.

The second challenged order, April 30, 1936, followed one entered April 15, 1936, which upon petition and replies reopened the proceedings for reconsideration on the record as it then stood. The later order affirmed former findings that the schedules suspended by the one of March 11, 1935, had not been justified, and prescribed future maximum rates upon a mileage basis. These were lower (some ten per cent) than those authorized prior to 1935.

Here counsel specially insist this second order exceeded the jurisdiction of the Commission since it undertook to determine rates concerning which there had been no proper notice or opportunity for hearing. But this contention rests upon an assumed construction of the order not obviously correct. The Commission has not so construed it nor has that body been asked so to do or for any further action in respect of it. Another construction brings the order clearly within the jurisdiction assumed by the Commission. In the circumstances appellants cannot prevail on this point.

Appellants further urge that the order is contrary to the weight of the evidence, not supported by substantial evidence, disregards ordinary standards for determining reasonableness of rates, is not supported by necessary findings, and represents a mere attempt to equalize geographical and transportation disadvantages, fortune and opportunities. The findings by the court below we think are adequately supported by the record. They negative these claims and leave no sufficient basis for our interference with the action there taken.

The challenged judgment must be

Mr. Justice BLACK and Mr. Justice CARDOZO took no part in the consideration or decision of this cause.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.